WELSA HEIRSHIP DETERMINATIONS
of
THOMAS J. SHINGOBE
and
ESTHER BELLECOURT SMITH

IBIA 97-132, 97-134 Decided October 15, 1997

Appeals from determinations of heirship under the White Earth Reservation Land Settlement Act.

Determination in Shingobe affirmed as modified; determination in Smith affirmed in part, reversed in part, and remanded.

1. Administrative Procedure: Standing--Indians: White Earth Reservation Land Settlement Act: Heirship Determinations

   The Minneapolis Area Director, Bureau of Indian Affairs, has standing to appeal to the Board of Indian Appeals from a determination of heirship made by an administrative judge under the White Earth Reservation Land Settlement Act.

2. Indians: White Earth Reservation Land Settlement Act: Heirship Determinations

   In making heirship determinations under the White Earth Reservation Land Settlement Act for decedents who died after the land transfers for which compensation is provided under the Act, the Department of the Interior must apply the Minnesota law governing the descent of personal property.

APPEARANCES: Marcia M. Kimball, Esq., Office of the Field Solicitor, Fort Snelling, Minnesota, for the Acting Minneapolis Area Director, Bureau of Indian Affairs; Daniel A. Webber, Esq., Cass Lake, Minnesota, for Nancy Lee Hart, Patrick Smith, Doreen Esther Smith, and Barbara Ann Smith; Sylvia Jean Lemay, pro se; Angela M. Lagarde, Acting WELSA Project Director, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

These are appeals from two heirship determinations made under the White Earth Reservation Land Settlement Act (WELSA), 25 U.S.C. § 331 note (1994). 1/ Appellant is the Acting Minneapolis Area Director, Bureau of

1/ All further references to the United States Code are to the 1994 edition.

Indian Affairs (Area Director; BIA), who seeks review of a May 20, 1997, Final Order Determining Heirs issued by Administrative Judge Larry Meuwissen in the WELSA heirship determination of Thomas J. Shingobe (Docket No. IBIA 97-132) 2/ and a June 12, 1997, Final Order Determining Heirs issued by Judge Meuwissen in the WELSA heirship determination of Esther Bellecourt Smith (Docket No. IBIA 97-134). For the reasons discussed below, the Board affirms the May 20, 1997, order in Shingobe as modified herein. It affirms the June 12, 1997, order in Smith in part, reverses it in part, and remands the matter to Judge Meuwissen for issuance of a new order consistent with this decision.

Background

In his May 20, 1997, order in Shingobe, Judge Meuwissen held that the heirs of Thomas J. Shingobe included Laura R. Shingobe and Valerie J. Shingobe, children of the decedent's predeceased son, Harold T. Shingobe (a.k.a. James D. Shingobe). In his June 12, 1997, order in Smith, the Judge held that the heirs of Esther Bellecourt Smith included Nancy Lee Hart, Patrick Smith, Doreen Esther Smith, and Barbara Ann Smith, children of the decedent's predeceased son, Theodore Simon Smith. In both cases, these grandchildren of the decedents had been born to unmarried parents.

In both orders, Judge Meuwissen held that 25 U.S.C. § 371 was applicable to the heirship determinations. 3/ He therefore determined that these grandchildren were heirs as a matter of Federal law. In Shingobe, the Judge also found that the parents of Laura R. Shingobe and Valerie J. Shingobe had entered into an Indian custom marriage before Laura and Valerie were born, so that Laura and Valerie were heirs on that basis as well. In Smith, the Judge rejected the contention of Nancy Lee Hart, Patrick Smith, Doreen Esther Smith, and Barbara Ann Smith that they were issue of an Indian custom marriage.

The Area Director filed notices of appeal from both decisions. In both cases, the Board determined under 25 C.F.R. § 4.356(d) that the Area Director had "set forth sufficient reasons for questioning the final order." 4/ The Board therefore issued an order giving all parties in interest an opportunity to respond.

A response in Shingobe was filed by Sylvia Jean Lemay. A motion to dismiss the appeal in Smith was filed by Nancy Lee Hart, Patrick Smith, Doreen Esther Smith, and Barbara Ann Smith, who also filed a brief on the

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2/ The May 20, 1997, order in Shingobe was amended by Judge Meuwissen on June 27, 1997, to correct two clerical errors.

3/ Section 371 is quoted below.

4/ Absent such a finding, the Board may issue a decision without further briefing. 43 C.F.R. § 4.356(d).

merits. A response as to both appeals was filed by the Acting WELSA Project Director. 5/

The Board has granted expedited consideration on the basis of the Area Director's concern that these cases may affect a large number of heirship determinations.

Motion to Dismiss

[1] Hart et al. contend that the Area Director lacks standing to appeal Judge Meuwissen's heirship determinations and that his appeal in Smith must therefore be dismissed. They base this contention primarily upon 43 C.F.R. §§ 4.350(c)(4) and 4.356(a).

Subsection 4.350(c)(4) provides: "The term party (parties) in interest means the Project Director and any presumptive or actual heirs of the decedent, or of any issue of any subsequently deceased presumptive or actual heir of the decedent." Subsection 4.356(a) provides: "A party aggrieved by a final order of an administrative judge under § 4.352, or by a final order upon reconsideration of an administrative judge under § 4.354, may appeal to the Board [of Indian Appeals]."

Hart et al. contend that, because the Area Director is not included in the definition of "party in interest" in the WELSA regulations, he is not a party to Smith and so cannot appeal under subsection 4.356(a). They acknowledge that the Board's procedural regulations include the following provision: "The Bureau of Indian Affairs shall be considered an interested party in any proceeding before the Board." 43 C.F.R. § 4.311(c). However, they argue, this provision conflicts with the more specific WELSA regulations which "specifically include[ ] the Project Director as a party and purposely leave[ ] out other administrative officers," thus demonstrating an intent "to preclude other administrative officials from appealing heirship determinations." Motion to Dismiss at 2. Because the WELSA regulations

5/ In addition, two motions to dismiss the appeal in Smith and one motion to dismiss the appeal in Shingobe were submitted to Judge Meuwissen and forwarded to the Board by the Judge. None of these motions was properly filed with the Board. One motion to dismiss the appeal in Smith was signed by the Acting WELSA Project Director (who later filed a response in both appeals directly with the Board). Motions to dismiss both Smith and Shingobe were signed by the Chairman of the White Earth Band of Chippewa Indians (Band). All three motions were apparently submitted to Judge Meuwissen by Zenas Baer, Esq., Hawley, Minnesota. It is not clear whether Mr. Baer intended to represent either or both of these parties.

Because the Board has before it a properly filed motion to dismiss the appeal in Smith, made on the same basis as these three improperly filed motions, and because the result in Smith will also control in Shingobe, the Board finds it unnecessary to determine whether these motions may be considered. The Board also makes no determination as to whether the Chairman of the Band is an interested party here.

are more specific than the Board's general procedural regulations, they reason, the WELSA regulations control here.

At the time the WELSA regulations were promulgated in 1991, the Project Director was a BIA official, as is evident from the definition of "Project Director" at 43 C.F.R. § 4.350(c)(3): "The term Project Director means the officer in charge of the White Earth Reservation Land Settlement Branch of the Minneapolis Area Office, Bureau of Indian Affairs, at Cass Lake, Minnesota." Thus there is no doubt that, in 1991, a BIA official had standing to appeal a WELSA heirship determination to the Board.

In his brief in Smith, the Area Director states:

> [I]n 1995, the WELSA Project, including most but not all of the administrative duties of the Project Director position, was contracted from the BIA to [the Band] pursuant to the [Indian Self-Determination Act (ISDA)].
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> Although the regulations have not been updated to reflect this structural change, the BIA continues to maintain a role in the administration of the WELSA Project. For instance, the Superintendent of the Minnesota Agency, an official within the BIA, now signs the Certification for Payment since the actual monetary distribution is an inherent federal function which cannot be performed by the WELSA contractor, [the Band]. This duty was performed by the WELSA Project Director prior to 1995. Additionally, the Contracting Officer's Representative (COR) for the contract is the Realty Officer at the Minneapolis Area Office of the BIA. The COR has responsibility for overseeing the contract on behalf of the Bureau. As a result, the BIA still performs some of the functions of the Project Director.

Area Director's Brief in Smith at 2-3. The Area Director thus contends:

> The BIA on behalf of the Secretary also did not contract away its standing to appeal decisions of the Administrative Judge which result in the payment of federal funds to those individuals determined to be entitled to compensation. The BIA maintains an administrative and contract supervisory role in the WELSA Project. Accordingly, it must be considered an interested party for purposes of this appeal pursuant to 25 C.F.R. § 4.356(a) and 43 C.F.R. § 4.311(c).

Id. at 3.

The Board takes official notice of the Band's ISDA contract, Contract No. CTF53T40820, which covers a number of programs, including the WELSA program. Under the contract, the Band is to "administer the contractible functions of the WELSA program in accordance with P.L. 99-264 [i.e., WELSA]." ISDA Contract at 4. The Program Standards for the WELSA Program, which are incorporated into the contract, describe the functions

of the WELSA Program. Several of the functions are designated as non-contractible. Most of these are related to the payment of compensation. 6/

It is clear that BIA has not contracted the entire WELSA Program to the Band. Rather, it has retained significant responsibilities, primarily related to the payment of compensation from Federal funds, including at least one function performed by the Project Director at the time the WELSA regulations were promulgated. Under these circumstances, the Board finds that the term "Project Director" in 43 C.F.R. § 4.350(c)(3) includes the Superintendent of the Minnesota Agency, as well as any other BIA official who is now performing any function which was performed by the Project Director in 1991.

The Superintendent is therefore a party in interest under 43 C.F.R. § 4.350(c)(4), with standing to appeal to the Board under 43 C.F.R. § 4.356(a). Because the Superintendent acts under authority delegated by the Area Director, the Board finds that the Area Director shares the Superintendent's standing to appeal to the Board.

In their brief on the merits, Hart et al. suggest that the Board's regulation at 43 C.F.R. § 4.311(c) does not permit BIA to appeal a decision to the Board but only to participate in an appeal filed by another party. Interested Parties' Response at 3-4.

The Board does not so interpret its regulation. See, e.g., Estate of Walter A. Abraham, 24 IBIA 86 (1993), holding that a BIA Superintendent has standing to appeal a probate decision issued by an Administrative Law Judge when that decision creates a conflict in the law. The decisions in Shingobe and Smith create a conflict with earlier WELSA heirship determinations. As in Abraham, therefore, the Board recognizes the standing of BIA, through the Superintendent or the Area Director, to appeal the heirship determinations in Shingobe and Smith under 43 C.F.R. § 4.311(c).

The Board finds that there is no conflict between the WELSA regulations and the Board's regulation at 43 C.F.R. § 4.311(c) with respect to the standing of BIA officials to appeal to the Board. Under either or both, the Area Director has standing to appeal these WELSA determinations to the Board. 7/

6/ Among the tasks designated as non-contractible are:

"Review and sign the final Estate value amount," "Sign and mail the notice of compensation and attachments (text files) to claimants with a current address," "Mail the certification report to the Treasury for deposit and a copy to the Central Office Budget Office," "Certify conclusive compensation determinations to the Secretary of the Treasury," and "Final Disposition of funds/property {sec. 8(e)}."

WELSA Program Standards at unnumbered 2-4.

7/ In light of this holding, Judge Meuwissen should ensure that either the Area Director or the Superintendent is included on the distribution list for every WELSA heirship determination.

The motion to dismiss is therefore denied.

Discussion and Conclusions

In the early part of this century, as a result of the Clapp Amendment, 8/ a large amount of allotted land on the White Earth Reservation was conveyed out of Indian ownership. Serious questions about the validity of these conveyances came to a head in the 1970's, ultimately leading to the enactment of WELSA in 1986. The recent history of this matter, as recounted by the United States Court of Appeals for the Eighth Circuit in Shangreau v. Babbitt, 68 F.3d 208, 209-210 (8th Cir. 1995), cert. denied, 116 S.Ct. 2547 (1996), is as follows:

> In State v. Zay Zah, 259 N.W.2d 580 (Minn. 1977), cert. denied, 436 U.S. 917 * * * (1978), the Minnesota Supreme Court held that the Clapp Amendment could not unilaterally abrogate the trust status of a White Earth allotment. In 1979 the Solicitor of the Department of the Interior overruled the 1915 [Solicitor's] opinion interpreting the Clapp Amendment [9/] and directed the Department to determine the heirs of any White Earth mixed-blood Chippewa who died holding a beneficial interest in a White Earth trust allotment. The Solicitor also interpreted State v. Zay Zah to invalidate title acquired through tax forfeiture, state probate awards and other forms of involuntary alienation, including purchase without the approval of the Secretary of the Department of the Interior from mixed-blood Chippewas under 21 years of age. The combined effect of State v. Zay Zah and the 1979 Solicitor's opinion was to cloud title to more than 100,000 acres in several Minnesota counties.

8/ This was a rider to the 1906 Indian Department Appropriations Act of June 21, 1906, 34 Stat. 325, 353, amended by the Act of Mar. 1, 1907, 34 Stat. 1015, 1034. As amended in 1907, the Clapp Amendment provided:

"That all restrictions as to sale, incumbrance, or taxation for [sic] allotments within the White Earth Reservation in the State of Minnesota, heretofore or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed-bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full-bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that such adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application."

9/ In the 1915 opinion, the Solicitor had "concluded that the Department of the Interior did not have jurisdiction to determine the heirs of adult mixed-blood Chippewas after 1906 because the Clapp Amendment had terminated the trust relationship between the United States and such individuals."
68 F.3d at 209.

> In 1986 Congress resolved the title problem by enacting WELSA. Under WELSA the federal government paid compensation to the heirs of the allottees in exchange for the land. WELSA directed the Secretary of the Department of the Interior to determine the allottees or heirs entitled to receive compensation and to proceed to make such heirship determinations as may be necessary to provide such notice of compensation. * * * In the process of developing procedures for determining who would be entitled to receive compensation, [BIA] analyzed which laws would be applicable to any heirship determinations. The BIA concluded that the laws relating to the inheritance of personal property in effect in the jurisdiction in which the decedent was domiciled on the date of death would likely be applicable. The prospect of applying the intestate succession laws of perhaps all 50 states, and possibly several foreign countries, over a period of more than 80 years prompted the BIA to request Congress to narrow the scope of the applicable laws.
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> On November 5, 1987, in response to the BIA request, Congress enacted the Indian Law Technical Amendments Act of 1987 (the 1987 Act), Pub. L. No. 100-153, 101 Stat. 886. Section 6(a) of the 1987 Act expanded the definition of "heir" in section 3(l) of WELSA to provide:
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> > a person who received or was entitled to receive an allotment or interest as a result of testate or intestate succession under applicable Federal or Minnesota law, or one who is determined under section 9, by the application of the inheritance laws of Minnesota in effect on March 26, 1986 * * *, to be entitled to receive compensation payable under section 8. [10/]

68 F.3d at 209-10.

Since enactment of the amendment to section 3(l), the Departmental interpretation of WELSA))shared by BIA, the Solicitor's Office, and the Administrative Judge who preceded Judge Meuwissen))has been that the Minnesota law governing descent of personal property governs heirship determinations under WELSA, in cases where the decedent died after the date of transfer of land. In Shingobe and Smith, Judge Meuwissen departed from that interpretation, holding instead that Federal and Minnesota law governing the descent of land, including 25 U.S.C. § 371, is applicable to all WELSA heirship determinations.

Section 371 provides:

10/ The 1987 amendment added the second part of this definition, i.e., "or one who is determined under section 9, by the application of the inheritance laws of Minnesota in effect on March 26, 1986, to be entitled to receive compensation payable under section 8."

> For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of section 348 of this title, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child.

If, contrary to Judge Meuwissen's holding, the Minnesota laws governing descent of personal property apply to these WELSA heirship determinations, one of the statutes applicable here is Minn. Stat. § 525.172 (1984) (repealed effective Jan. 1, 1987), which provided:

> A child born to a mother who was not married to the child's father when the child was conceived nor when the child was born shall inherit from the mother the same as if the child was conceived or born to her while she was married, and also from the person who in writing and before a competent witness shall have declared himself to be the child's father, provided such writing or an authenticated copy thereof shall be produced in the proceeding in which it is asserted or from the person who has been determined to be the father of such child in a paternity proceeding before a court of competent jurisdiction; but such child shall not inherit from the kindred of the father by right of representation.

Because Laura R. Shingobe, Valerie J. Shingobe, Nancy Lee Hart, Patrick Smith, Doreen Esther Smith, and Barbara Ann Smith would take from kindred of their fathers by right of representation, they would not qualify as heirs under the Minnesota provision. If, on the other hand, 25 U.S.C. § 371 applies here, they would qualify as heirs.

In a 24-page Memorandum Opinion in Smith, Judge Meuwissen first concluded that the decision in Shangreau v. Babbitt is not controlling because that case was "narrowly argued and * * * narrowly decided," Memorandum Opinion at 2, and did not deal with the applicability of 25 U.S.C. § 371, which was mentioned only briefly in the heirship decision at issue in Shangreau. 11/

In Shangreau, the plaintiffs contended that the definition of "heir" in section 3(l) of WELSA invidiously discriminated against illegitimate children in violation of the due process clause of the Fifth Amendment. This contention was based upon the premise that the WELSA definition of "heir" incorporates Minn. Stat. § 525.172 (1984). The Eighth Circuit

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11/ This was an Apr. 30, 1993, Order Determining Heirs issued by Administrative Judge Sandra L. Massetto in the WELSA Heirship Determination of Richard C. Beaupre. Judge Massetto's order was affirmed by the Board on Jan. 19, 1994, 25 IBIA 133.

clearly understood that such an incorporation had been effected, 12/ as did the district court. In fact, based upon such an understanding, both courts engaged in a constitutional analysis of section 3(l) of WELSA, an exercise the courts presumably would not have engaged in had they believed the case could have been decided on the basis of an interpretation of WELSA such as the one now set forth by Judge Meuwissen. 13/ It is fair to say, therefore, that the decisions of both the district court and the court of appeals were predicated upon an assumption that 25 U.S.C. § 371 did not apply. At the same time, it is true, as Judge Meuwissen stated, that neither court discussed 25 U.S.C. § 371 or specifically addressed the question of whether the laws governing descent of real property or those governing descent of personal property were applicable to WELSA heirship determinations. In light of the conclusions below, the Board finds it unnecessary to decide whether Judge Meuwissen should have found himself bound by the decision in Shangreau.

Judge Meuwissen acknowledged that the 1987 amendment to section 3(l) of WELSA was proposed by the Department of the Interior. In fact, he quoted from the letter of the then Assistant Secretary - Indian Affairs transmitting the proposal. That letter stated in relevant part:

> Section 5 provides two amendments to facilitate carrying out the White Earth Reservation Land Settlement Act of 1985 (25 U.S.C. 331 note). The first amendment would enable the Secretary of the Interior to apply the laws of Minnesota governing the inheritance of money and other personal property in the determining of heirs under the Act. Without the amendment the Secretary must apply the law of the State in which the decedent was domiciled at the time of death. By applying the laws of Minnesota as of the date of enactment of the Act (March 26, 1987 [sic, should be March 24, 1986]), the application of a multiplicity of inheritance laws at various points in time is avoided and we will be able to hold down the cost and time required for the probate of estates under the Act.

S. Rep. No. 186, 100th Cong., 1st Sess. 10 (1987), reprinted in 1987 U.S.C.C.A.N. 833, 839.

12/ See, e.g., 68 F.3d at 211: "The ALJ applied Minn. Stat. § 525.172, as incorporated by the 1987 Act, and concluded that because Richard Charles Beaupre was an illegitimate child whose father had predeceased him, he could not inherit by right of representation from his paternal grandfather, Richard C. Beaupre."

13/ See, e.g., Jean v. Nelson, 472 U.S. 846, 854 (1985):

"'Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.' * * * This is a 'fundamental rule of judicial restraint.' * * * 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" (Citations omitted.)

After quoting the Assistant Secretary's letter, Judge Meuwissen continued:

> The only plausible explanation for the assertion that "without the amendment the Secretary must apply the law of the State in which the decedent was domiciled at the time of death" is that someone in the Department of [the] Interior assumed that descent of WELSA compensation would be governed by the law of personal property. Real property always descends according to the law of its situs, irrespective of the decedent's domicile. As real property, the law of Minnesota already governed as specified in the original enactment of WELSA, and the amendment was unnecessary and superfluous. Undoubtedly, the Assistant Secretary's letter was based on a memorandum and an analysis by someone in the Department, but based upon the preceding discussion herein, [14/] I doubt that I would find its reasoning persuasive. I believe that the money, whatever its date of origin, must be paid to those who are presently deprived of an interest in land and, consequently, the descent of the money must follow the descent of the land. [Footnote omitted.]

Memorandum Opinion in Smith at 11-12.

The Board finds Judge Meuwissen's analysis flawed in several respects. Most importantly, he ignored the fact that Congress in 1987, after having been explicitly informed by the Assistant Secretary as to the purpose and

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14/ Judge Meuwissen's analysis is summarized at pages 7-8 of his Memorandum Opinion in Smith:

"[B]ut for the enactment of WELSA, original allottees or their heirs would own interests in land. Any determination of heirs would necessarily involve the descent of land in order to determine the identity of current owners. WELSA is a Land Settlement Act whose purpose is to satisfy the constitutional requirement of paying just compensation for the abrogation of vested rights in land. The bill aimed to provide compensation "to each heir or allottee who has been identified as losing an interest in land due to the clearing of titles and extinguishment of claims outlined in the bill. In other words, in order to permanently take away the vested rights in land owned by allottees or their heirs and resolve land title problems, WELSA established a means of paying compensation to those whose land interests were being taken. It necessarily follows as night does day that determining the identity of those who should receive the personal property (i.e., money) as compensation for the loss of their land interests requires a determination of who owns the land interest. * * *

"It follows that determinations of descent of the compensation provided under WELSA as a substitute for the land interests abolished by WELSA must, as a matter of law, be made according to the laws governing the descent of real property and * * * 25 U.S.C. § 371 must be applied in WELSA heirship determinations." (Footnotes omitted.)

effect of the amendment being proposed))including the fact that the Minnesota law governing descent of personal property would apply to WELSA heirship determinations))undertook to enact that amendment. Under such circumstances, it cannot be doubted that Congress confirmed and ratified BIA's initial interpretation of WELSA as requiring that compensation under the Act be treated as personal property. Indeed, by enacting the amendment as proposed, Congress made this interpretation a matter of statutory law. 15/

Further, Judge Meuwissen ignored the plain language of WELSA. Section 6 of WELSA provides:

> (a) * * * After such publication [of a certification that certain conditions had been met], any allotment or interest which the Secretary, in accordance with this Act, determines falls within the provisions of section 4(a), 4(b), or 5(c), [16/] the tax forfeiture, sale, mortgage, or other transfer, as described therein, shall be deemed to have been made in accordance with the Constitution and all laws of the United States specifically applicable to transfers of allotments or interests held by the United States in trust for Indians, and Congress hereby does approve and ratify any such transfer effective as of the date of said transfer, subject to the provisions of section 6(c) [not relevant here]. * * *
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> (b) By virtue of the approval and ratification of transfers of allotments and interests therein effected by this section, all claims against the United States, the State of Minnesota or any subdivision thereof, or any other person or entity, by the White Earth Band, its members, or by any other Indian tribe or Indian, or any successors in interest thereof, arising out of, and at the time of or subsequent to, the transfers described in section 4(a), 4(b), or 5(c) and based on any interest in or nontreaty rights involving such allotments or interests therein, shall be deemed never to have existed as of the date of the transfer, subject to the provisions of this Act.

15/ Judge Meuwissen gave rather short shrift to some basic rules of statutory construction. For instance, in concluding that the 1987 amendment to WELSA was "unnecessary and superfluous," he disregarded the well-established principle that Congress intends its enactments to have meaningful effect. See, e.g., Sutton v. United States, 819 F.2d 1289, 1294-95 (5th Cir. 1987) and cases cited therein; Jackson v. Kelly, 557 F.2d 735, 740 (10th Cir. 1977). See also the related line of cases holding that a court must give effect, if possible, to every word Congress used. E.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); United States v. Menasche, 348 U.S. 528, 538-39 (1955).

16/ These provisions describe the circumstances under which allotments, or interests therein, are subject to WELSA.

Subsection 8(a) provides: "Compensation for a loss of an allotment or interest shall be the fair market value of the land interest therein as of the date of tax forfeiture, sale, allotment, mortgage, or other transfer described in section 4(a), 4(b), or 5(c), less any compensation actually received, plus interest * * *."

The Area Director contends that, under these provisions, "[p]ersons who were entitled to compensation under WELSA as of the date of transfer and who have subsequently died cannot be deemed to have held title to the allotments or interests therein as of their deaths but rather died holding the right to compensation." Area Director's Statements of Reasons in Shingobe at 6 and Smith at 7.

The Area Director notes that there are actually two types of heirship determinations which are made under WELSA. The first, which BIA terms a "pre-date-of-taking" determination, is one in which the decedent was an allottee or heir who died prior to the transfer ratified by WELSA and who thus died holding an interest in land. In such a case, the Area Director recognizes, the Federal and Minnesota laws concerning the descent of real property apply, including 25 U.S.C. § 371. The other type of heirship determination, which BIA terms a "post-date-of-taking" determination, is one in which the decedent died after the transfer and who thus, the Area Director contends, died holding only a claim for monetary compensation under WELSA, which is personal property, rather than real property. 17/

The determinations in both Shingobe and Smith are post-date-of-taking determinations. 18/ Thus, in the Area Director's view, Judge Meuwissen erred in concluding that the Federal and Minnesota laws governing the descent of real property apply in these cases.

[2] The Board agrees with the Area Director's analysis. As is clear from the provisions of WELSA quoted above, that statute extinguished interests in land as of the date of transfer of the land and deemed any claims arising from a transfer "never to have existed as of the date of the transfer." Thus, under WELSA, once the transfers had occurred, allottees and heirs had no interests in land and no claims arising from a taking of interests in land. Contrary to the apparent premise of Judge Meuwissen's decision, there are no heirs in these cases who are "presently deprived of an interest in land." Memorandum Opinion in Smith at 12. 19/

17/ Judge Meuwissen did not discuss this distinction, presumably because, under his analysis, it has no significance.

18/ The transfer at issue in Shingobe was made on Sept. 11, 1940. Shingobe died on Dec. 14, 1978.

The transfer at issue in Smith was made on Jan. 28, 1909. Smith died on Nov. 6, 1980.

19/ Hart et al. contend that the "taking" for purposes of distinguishing between "pre-date-of-taking" and "post-date-of-taking" determinations "should be thought of as the enactment of WELSA, rather than the original

While extinguishing interests in land, WELSA granted the allottees and heirs a right to monetary compensation. A right to monetary compensation is, as the Area Director argues, regarded as personal property rather than real property, even where the right arises from a transaction involving real property. See, e.g., 73 C.J.S. Property § 21 (1983); 63A Am. Jur. 2d Property § 26 (1984). Further, even if there had been a question as to the nature of WELSA compensation (i.e., as personal property or real property) under the original statute, any doubt was removed in 1987 upon enactment of the amendment discussed above. Therefore, the Board finds that Judge Meuwissen erred in applying Federal and Minnesota laws governing the descent of real property, including 25 U.S.C. § 371, in these heirship determinations.

Much of Judge Meuwissen's Memorandum Opinion is devoted to a discussion of his reasons for believing that Indian children deemed illegitimate under State law should not, for that reason, be excluded as heirs under WELSA. Judge Meuwissen's views on this point are not relevant to the determinations to be made here. It is Congress which had the authority to, and did, set the policy to be implemented in WELSA heirship determinations. Judge Meuwissen's task was to implement the statute as Congress enacted it. In accordance with the Congressional directive, he was required to apply the Minnesota law governing descent of personal property in these two heirship determinations.

Neither the Area Director nor any other party challenged Judge Meuwissen's finding in Shingobe that Laura and Valerie Shingobe are heirs by virtue of a custom marriage between their parents. Therefore, the May 20, 1997, Final Order Determining Heirs in Shingobe is affirmed as modified to hold that Laura and Valerie are heirs on that basis only.

In his Final Order Determining Heirs in Smith, Judge Meuwissen stated:

> The objectors [Hart et al.] claim the right to inherit from the decedent by right of representation on the basis of an alleged Indian custom marriage between Theodore Simon Smith and Alice Windom, the mother of the objectors. For reasons set forth in the accompanying memorandum [i.e., the Memorandum Opinion discussed above], the objections are disallowed on the grounds asserted.

Final Order Determining Heirs at 2.

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fn. 19 (continued)
disputed property transfer." Interested Parties' Response at 10. Thus they contend that the heirship determinations for all decedents who died prior to March 24, 1986 (the date of enactment of WELSA), should be made by applying Federal and Minnesota law governing the descent of real property. Hart et al. offer no support whatsoever for their contention, which disregards entirely the explicit language of WELSA establishing the date of transfer as the date of taking. The Board rejects their argument as totally without foundation.

In the Memorandum Opinion, he stated:

> There is no evidence and it seems unlikely that [Theodore Simon Smith and Alice Windom] contracted an Indian custom marriage before the enactment of Public Law 280 in 1953. */ There is no dispute that they had four children together before they married (in a Catholic ceremony) on April 5, 1971. Their children are legitimate in the eyes of their church, their family, their culture and under preemptive Federal law. A Minnesota law, based on a "Christian consciousness" evolved over centuries by white Europeans cannot be applied to disinherit these children.
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> */ Act of August 15, 1953, c. 505 § 4. 67 Stat. 589, codified at 28 U.S.C. § 1360. Public Law 280 made Minnesota marriage and family law applicable to the White Earth Chippewa.

Memorandum Opinion at 19.

Concerning this discussion in the Memorandum Opinion, the Area Director argues: "The Administrative Judge makes vague reference that the children of Theodore Simon Smith and Alice Windom may actually be considered legitimate for WELSA purposes. If this is the intent, it clearly is incorrect." Area Director's Statement of Reasons at 13.

The Board finds this part of Judge Meuwissen's Memorandum Opinion somewhat muddled, seeming to drift from a finding against a custom marriage between Theodore Simon Smith and Alice Windom into a general policy-based discussion incorporating, apparently, his theory that 25 U.S.C. § 371 is applicable here, a theory which the Board has rejected.

Despite the problems with this passage, it is clear from the Final Order Determining Heirs and the first sentence of the quoted passage from the Memorandum Opinion that Judge Meuwissen found that no custom marriage between Theodore Simon Smith and Alice Windom had been shown.

In their response in this appeal, Hart et al. contend that they "are legitimate children of the decedent," Interested Parties' Response at 10, although presumably they mean to say that they are legitimate children of Theodore Simon Smith and Alice Windom. They follow this contention with a discussion of custom marriage in the Minnesota Chippewa Tribe. It appears from this discussion that they may be attempting to appeal Judge Meuwissen's June 12, 1997, Final Order Determining Heirs insofar as the Judge declined to find that Theodore Simon Smith and Alice Windom had entered into a custom marriage prior to the births of Hart et al. As an appeal from that order, however, the response filed by Hart et al. is clearly untimely.

No timely appeal was filed from the Judge's finding that a custom marriage between Theodore Simon Smith and Alice Windom was not shown. Therefore, that finding is final for the Department of the Interior, and no basis remains upon which Hart et al. can be recognized as heirs in this case.

The June 12, 1997, Final Order Determining Heirs in Smith and the Memorandum Opinion of the same date are affirmed insofar as they held that Nancy Lee Hart, Patrick Smith, Doreen Esther Smith, and Barbara Ann Smith are not issue of a custom marriage. They are reversed insofar as they held that Federal and Minnesota laws governing the descent of real property are applicable to this WELSA heirship determination. This matter is remanded to Judge Meuwissen for a recalculation of the shares to be distributed to the heirs of Esther Bellecourt Smith under this decision and issuance of a new Final Order Determining Heirs in Smith setting forth the recalculated shares.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, and as set out above, Judge Meuwissen's May 20, 1997, Final Order Determining Heirs in Shingobe is affirmed as modified, and his June 12, 1997, Final Order Determining Heirs in Smith is affirmed in part, reversed in part, and remanded to him for recalculation of shares and issuance of a new order. 20/

_____
Anita Vogt
Administrative Judge

I concur:

_____
Kathryn A. Lynn
Chief Administrative Judge

_____

20/ The Board has not yet addressed the responses filed by Sylvia Jean Lemay and the Acting WELSA Project Director.

Ms. Lemay argues that Laura and Valerie Shingobe have always been considered part of the Shingobe family and should therefore be considered heirs here. She acknowledges however, that heirship determinations must be based upon law and not upon family feelings.

As discussed above, there has been no challenge to Judge Meuwissen's finding that Laura and Valerie are heirs by virtue of a custom marriage between their parents. Accordingly, that finding stands.

The response of the Acting WELSA Project Director states in its entirety:

"As Acting WELSA Project Director I request that the court uphold the decision of Judge Larry Meuwissen. He sets forth the proper interpretation of the remedial act passed to try and rectify the injustices of the past. I would ask the Appeals Court to send the matter back for a full factual and legal record on whether the Area Director has standing to appeal the decision." Sept. 8, 1997, Response of Acting WELSA Project Director.

For the reasons discussed in the body of this decision, these arguments are rejected.